RECORD
AND
BRIEFS

No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal From the United States District Court for the Western District of Wisconsin

BRIEF OF THE LEAGUE OF WOMEN VOTERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The League of Women Voters of the United States (the League) is a non-partisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in more than 750 communities and in every State. Since its founding, the League has actively engaged in advocacy asserting that voting and fair elections are fundamental rights for all citizens.

The League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than fifty years. During that time, the League has worked to increase participation in elections and protect voting rights at the local, state, and federal levels.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have filed blanket consents in this matter.

SUMMARY OF ARGUMENT

Appellants argue for the creation of a novel, unjustified barrier to a partisan gerrymandering claim: a safe harbor for legislatures that engage in gerrymandering but do so in apparent compliance with traditional redistricting principles of compactness, contiguity, and respect for political subdivisions. According to Appellants, if a redistricting complies with traditional redistricting principles, it must be sustained as a matter of constitutional law.

Appellants' proposed safe harbor is legally unsupported and would have dangerous consequences. It would elevate form over substance, allowing intentional and extreme political gerrymanders so long as districts have a benign appearance. This Court's precedent does not support categorically immunizing a legislature from inquiry into whether districts were drawn with the intent and effect of obtaining a constitutionally impermissible partisan advantage, even if they have the facial appearance of normalcy. And for good reason, given that even a "normal"-looking districting plan can violate core representative and participatory rights protected by the First and Fourteenth Amendments. Nor does the historical understanding of the term "gerrymandering" support Appellants' position, not in the least because Appellants misinterpret relevant historical materials.

Several *amici* supporting Appellants likewise argue that gerrymanders should be immune from challenge if they appear to be based on traditional districting principles. Resisting the characterization of a "safe harbor," some *amici* argue that such redistricting falls outside the definition of "gerrymandering" in the first place. These definitional arguments are wrong, including as a historical matter, but in any event, none of these *amici* justifies a dispositive status for compactness or other traditional principles.

Traditional districting principles are not irrelevant to partisan gerrymandering claims. They can be important guideposts, in, for example, examining the intent and potential justification of a legislature's redistricting effort. But a district that appears to comply with traditional districting principles is not automatically constitutional. Such a holding would be contrary to this Court's jurisprudence. It also would bring little clarity, since traditional criteria like compactness are themselves ill-defined and inconsistently applied. Further, it would ignore the reality that increasingly sophisticated technologies allow legislatures to cloak intentional, extreme partisan gerrymanders in "normal"-looking districts. These concerns counsel strongly against adopting Appellants' proposed safe harbor.

ARGUMENT

I. Appellants' Proposed Safe Harbor For Apparent Use Of Traditional Districting Principles Is Unsupported By Precedent.

Appellants argue for an all-or-nothing safe harbor for "normal"-looking political gerrymandering. According to Appellants, a court must find that "no unlawful political gerrymandering has occurred where . . . the legislature complied with traditional redistricting principles." Appellants' Br. at 59.[2] Appellants argue that if a redistricting appears to comply with these principles, such as compactness, it must be sustained as constitutional "as a matter of law." *Id.* at 61. Put another way, Appellants argue that deviation from traditional redistricting principles is a necessary element of a partisan gerrymandering claim.

This Court's jurisprudence does not support such an approach, which would preclude the necessary inquiry into a legislature's intent in drawing district lines, as well as the effect of those lines. This inquiry is necessary to address the touchstone of a partisan gerrymandering claim: whether there has been "an *excessive* injection of politics" into the redistricting process. *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004)

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[2] The Court has identified "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" as legitimate considerations in a redistricting process. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

(plurality opinion). A partisan gerrymandering claim is grounded in both the Equal Protection Clause, which prohibits deliberate dilution of groups' voting power, and the First Amendment, which forbids discrimination against voters based on their political beliefs. This Court's precedent, including *Vieth* and *Davis v. Bandemer*, 478 U.S. 109 (1986), indicates that a workable standard must account for all relevant constitutional considerations.

Beginning as early as *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court recognized that traditional districting criteria are not dispositive of constitutional challenges to the drawing of district lines. The unanimous Court in *Gaffney* explained that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.* at 752 n.18 (citations omitted). *Gaffney* also observed that districts equal in population — and thus apparently "normal" — can "still be vulnerable under the Fourteenth Amendment." *Id.* at 751; *cf. Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (contemplating that multimember districts are susceptible to challenge if they "operate to minimize or cancel out the voting strength of racial or political elements of the voting population").

Following *Gaffney*, the Court has consistently considered and rejected treating as dispositive traditional districting criteria (in whole or in part). For example, in *Bandemer*, Justice Powell set forth the view that "the shapes of voting districts and

adherence to established political subdivision boundaries" are "[t]he most important factors" in a redistricting challenge. 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part). This view was rejected by the *Bandemer* plurality, which provided that a showing of an "an actual disadvantage in terms of fair representation on a group level" was necessary. *Id.* at 140-41 (plurality opinion).

Nearly two decades later in *Vieth*, the Court also rejected the notion that a partisan gerrymandering claim should turn on a showing of whether the challenged redistricting "paid little or no heed to traditional districting principles." *Vieth*, 541 U.S. at 295-96 (plurality opinion). Three dissenting Justices admirably set forth proposed standards for adjudicating partisan gerrymandering claims. *See id.* at 347-52 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 333-39 (Stevens, J., dissenting). To the extent these standards would have required a plaintiff to establish a disregard of traditional districting principles, however, the plurality balked, asking "*[h]ow much* disregard of traditional districting principles," *id.* at 296 (plurality opinion). The *Vieth* plurality viewed such an approach as requiring a "quantifying judgment" that did not lend itself to a workable judicial standard. *Id.*

Even aside from workability, *Vieth* indicates that compactness should not be talismanic — either to show liability or to disprove it — because traditional principles such as "contiguity and compactness" "cannot promise political neutrality" and

"unavoidably have significant political effect, whether intended or not." *Id.* at 308-09 (Kennedy, J., concurring in the judgment). As the *Vieth* plurality explained, "a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions" might nevertheless cause certain political groups to be "systematically affected by what might be called a 'natural' packing effect." *Id.* at 290 (plurality opinion) (citation omitted).

In short, there is a real concern that making non-compliance with traditional districting criteria a prerequisite to gerrymandering claims will immunize certain "normal"-looking maps that are in fact unconstitutional gerrymanders. As the Court has forcefully explained in the racial gerrymandering context, by deploying the traditional principles of districting "in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles," even if "race for its own sake is the overriding reason for choosing one map over another." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Thus, although deviation from traditional districting principles may be *relevant* to a constitutional violation, "there is no rule requiring challengers to present this kind of evidence in every case." *Id.*; *see id.* ("[A] conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial

gerrymandering."); *see Miller v. Johnson*, 515 U.S. 900, 910-11 (1995) (rejecting the argument that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race").

This reasoning from the Court's racial gerrymandering cases applies squarely to the partisan gerrymandering context. Appellants provide no principled reason why it does not. Of course, as Appellants note, and as this Court has rightly observed, "[r]ace is an impermissible classification," subject to the most exacting scrutiny. Appellants' Br. at 62 (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment)). But any "special consideration" applicable in the context of racial classifications, Appellants' Br. at 62, is not the *reason* why the racial gerrymandering cases refuse a categorical rule that compactness is a prerequisite for liability. Rather, such a rule has been conclusively rejected by the Court because it misses the constitutional point: "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Bethune-Hill*, 137 S. Ct. at 798 (2017); *see id.* at 798-99 (discussing the "racial predominance" inquiry applicable to racial gerrymandering claims). Likewise here, the First and Fourteenth Amendments prohibit partisan gerrymanders, not ugly districts. *See* Appellees' Br. at 33 ("[A] court must find discriminatory intent, a large and durable discriminatory effect, and a lack of any legitimate

justification."). In the context of partisan gerrymandering, just as in racial gerrymandering, a bright-line safe harbor would prevent full and fair resolution of the fundamental question at issue: does the gerrymander have an unconstitutional (and unjustifiable) purpose and effect.

The district court, having performed a comprehensive and respectful assessment of this Court's cases, thus correctly rejected Appellants' argument that "compliance with traditional districting principles necessarily creates a constitutional 'safe harbor' for state legislatures." Jurisdictional Statement App. (JS App.) 120a. As the district court accurately observed, this proposed rule is "novel" and "finds no support in the law," as "[i]t is entirely possible to conform to legitimate redistricting purposes but still violate the Fourteenth Amendment because the discriminatory action is an operative factor in choosing the plan." *Id.* In particular, "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria." *Id.* at 121a-122a. Thus — and undeniably — "[a] map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." *Id.* at 122a.

The dissent below resisted the characterization of immunity based on traditional districting principles as a "safe harbor," *Id.* at 258a. But that is precisely what Appellants' proposed rule would be. According to the dissent, it would be a "gerrymander without

gerrymandering" to allow a partisan gerrymandering claim if a district appears to conform to traditional districting principles. *Id.* at 250a. As discussed above, however, that is not the law. The Court has never endorsed the view that a gerrymander *must* be bizarrely shaped, despite repeated opportunities to do so.

Moreover, the dissent below and Appellants both overread the separate opinions of Justices Stevens and Souter in *Vieth*, in claiming that those opinions would have categorically precluded a challenge to a districting plan that had the facial appearance of normalcy, notwithstanding a demonstrably improper intent and effect. According to Justice Stevens, he would "apply the standard set forth in the *Shaw* cases." *Vieth*, 541 U.S. at 339 (Stevens, J., dissenting). As explained above, this Court's precedent is clear, dating back to at least *Miller*, that the "normal" appearance of a district does not foreclose a racial gerrymandering claim. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 799; *Miller*, 515 U.S. at 910-11 (1995). Thus, Justice Stevens' approach would not have created the safe harbor Appellants seek.

Likewise, Justice Souter (joined by Justice Ginsburg) in *Vieth* did not categorically foreclose a partisan gerrymandering claim where traditional principles of districting merely *appear* to have been followed. To begin with, Justice Souter's suggested framework would have applied to individual districts, *Vieth*, 541 U.S. at 346, 353 (Souter, J., dissenting) — as opposed to a statewide map like

that at issue here, for which he did not attempt a standard. As the evidence in this case shows, "traditional criteria" can be used on a systematic, statewide basis to attempt to cloak improper intent and effect. In any event, Justice Souter's suggested requirement that a plaintiff show that her district "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly," *id.* at 347-48, leaves room for liability where — as here — traditional districting concerns are used as a mask for improper partisan gain. In such a situation, the line-drawers ultimately pay "little or no heed" to traditional districting principles, because the quest for partisan gain — not the claimed principles — is determinative.

In addition to arguing for a safe harbor that is unsupported by this Court's precedent, Appellants rely on historical sources, *see* Appellants' Br. at 5-10, that do not support their claim that gerrymandering necessarily involves bizarrely shaped districts. In fact, Appellants' sources themselves demonstrate that the term "gerrymandering" means drawing districts for partisan advantage, with a bizarre shape being evidence of motive but not the wrong itself. For example, the 1877 dictionary cited by Appellants, *see id.* at 5, defines "gerrymandering" as: "Arranging the political divisions of a State, so that in an election, one party may obtain an advantage over its opponent, even though the latter may possess a majority of the votes in the State." John Russell Bartlett, *Dictionary of Americanisms* 248

(4th ed. 1877). Appellants fail to cite this definitional first sentence, *see* Appellants' Br. at 5, instead quoting a snippet of language from the entry's description of the 1811 Massachusetts districting that included the notorious salamander. Although the bizarre shape of the 1811 district was indeed notable evidence of gerrymandering, it was not the wrong itself. Likewise, the Elmer Griffith book heavily relied on by Appellants, *see id. at* 5-7, 60-61, does not support limiting the definition of gerrymandering to bizarrely shaped districts. Griffith states that gerrymandering is district-drawing that "sets aside the will of the popular majority" and "is intended to disenfranchise the majority or to secure it an influence disproportionate to its size." Elmer C. Griffith, *The Rise and Development of the Gerrymander* 7, 8 (1907). Gerrymandered districts are "established especially for election purposes" and "formed intentionally in a particular manner for partisan advantage." *Id.* at 20. Although Griffith observes that this is often accomplished by disregarding the boundaries of political subdivisions, he does not define "gerrymander" to require a bizarre shape. Likewise, the Erik Engstrom book cited repeatedly by Appellants, *see* Appellants' Br. at 6-10, does not limit gerrymanders to bizarrely shaped districts. To the contrary, he describes gerrymandering as "the strategic manipulation of congressional districts." Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 8 (2013). These are just a few examples of Appellants' distortion of

the historical sources to suggest a definitional limit on the term "gerrymandering" that does not exist.

Following traditional districting principles can be a constitutional safeguard and a manifestation of good government. Indeed, the League has endorsed use of these principles when they are not used to provide "[p]referential treatment for a political party." League of Women Voters, Statement of Position on Redistricting, as Adopted by Concurrence, June 2016, http://lwv.org/content/election-process. Violation of these principles also can be important evidence of unconstitutional activity, as the Court has long recognized. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 798 ("bizarreness . . . may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale" (quoting *Miller*, 515 U.S. at 913)). In short, respect for traditional districting principles is potentially relevant evidence to the ultimate assessment of a gerrymandering claim — whether racial or partisan in nature. But the Court has before, and should again, conclusively reject Appellants' proposed safe harbor, which would turn traditional districting principles into an end in themselves. They are not. Compliance with the Constitution is.

II. *Amici's* Gloss On Appellants' Proposed Safe Harbor Is Not Convincing.

Several *amici* echo Appellants' call for a safe harbor for compact districts or districts that

otherwise appear in compliance with traditional redistricting principles. None of these *amici* provides a justification for the categorical safe harbor Appellants seek.

For example, *amicus* Republican National Committee (RNC), like the dissent below, advocates for what it calls "an actual gerrymander" as a requirement for political gerrymandering claims. RNC Br. at 2-3, 8, 13, 36; *see* JS App. at 252a ("Without evidence of any distortion of otherwise legitimate district boundaries, there is no gerrymander, at least as the term is traditionally understood."). According to the RNC, a gerrymandered district must be "unnecessarily bizarrely shaped district drawn without regard to traditional districting criteria." RNC Br. at 14. The RNC contends that "[a] regularly shaped district drawn according to traditional . . . redistricting criteria, by definition, is not a gerrymander." *Id.* at 15 (citation omitted). The RNC's definitional argument is incorrect as a matter of both precedent and history, as detailed above. While it is of course true that some "quintessential example[s] of gerrymandering" *id.*, involve bizarrely shaped districts, a bizarre shape has never been a definitional requirement for a gerrymander.

The RNC also argues that "districts drawn in accord with traditional districting principles should not be susceptible to political gerrymandering challenges." *Id.* at 20. This argument is the same as Appellants' all-or-nothing request — to provide a safe harbor for redistricting plans that facially

appear consistent with traditional districting principles. As explained above, this novel approach is neither supported nor justified.

Finally, acknowledging that this Court's racial gerrymandering cases conclusively reject the categorical immunization that Appellants seek here, *see id* at 16, the RNC — like Appellants — attempts to distinguish those cases, stating that "[p]laintiffs in political gerrymandering cases are very differently situated," *id.* 18. Of course there are differences between racial gerrymandering and partisan gerrymandering, including in terms of history, applicable constitutional provisions, the nature of the harm suffered, and case law. But that does not mean that on-point reasoning from the racial gerrymandering cases does not apply in the partisan gerrymandering context. The reasons the Court refused a safe harbor in *Bethune-Hill* and earlier cases is not because there were racial classifications at issue; it was because such a safe harbor does not capture the constitutional inquiry and makes the traditional criteria ends in themselves, rather than guideposts. As Justice Kennedy put it: "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Bethune-Hill*, 137 S. Ct. at 798. Likewise here, the Equal Protection Clause and the First Amendment do not prohibit "unnecessarily bizarrely shaped district[s]," RNC Br. at 14. They prohibit "an *excessive* injection of politics" into the redistricting process. *Vieth*, 541 U.S. at 293 (plurality opinion).

Amicus Wisconsin Institute for Law & Liberty (WILL) asks for precisely the same thing as Appellants and the RNC — immunity for legislatures that adhere to traditional districting criteria — based largely on the same arguments. WILL Br. at 22-28. According to WILL, "[a] district is not an unconstitutional gerrymander when it complies with traditional districting criteria." *Id.* at 23. Again, this approach — which would immunize blatant gerrymanders so long as they are covered up with traditional redistricting criteria — is unsupported by precedent and history. Unlike Appellants and the RNC, however, WILL refuses to acknowledge that this Court has rejected a categorical safe harbor in the racial gerrymandering cases, claiming that the alleged "consensus" in *Vieth* to sustain districts that adhere to traditional redistricting criteria "accords with the Court's reasoning in racial gerrymandering cases." *Id.* at 25. Of course, there was no "consensus" in *Vieth* that traditional redistricting criteria provide a dispositive safe harbor. And in no case is that what the racial gerrymandering cases stand for: as explained above, those cases reject a safe harbor. *See, e.g.*, *Miller*, 515 U.S. at 914 ("the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim").

To its credit, *amicus* National Republican Congressional Committee (NRCC) recognizes that "[g]rouping people into compact districts is not an end in and of itself." NRCC Br. at 33. The NRCC then theorizes, however, that a "[c]ompact district

allow citizens to better engage in the political process." *Id* at 33 (citation omitted). Even assuming this were true, it is not a reason to provide a categorical safe harbor for compact districts against partisan gerrymandering claims. Even if compact districts (or those that comply with other traditional districting principles) create some positive effects, that does not mean that compactness or similar features must be *dispositive* of the constitutional inquiry.

In any event, the NRCC's assumptions about the benefits of compactness are wrong. Studies by political scientists concerning the relationship between district compactness and metrics of political engagement have found nearly no correspondence. As one prominent scholar has concluded, "I do not believe there is anything desirable per se about districts that look like squares or circles." Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 89-90 (1985); *see* Micah Altman, *Districting Principles and Democratic Representation* 323, 324-34 (Mar. 31, 1998) (measuring the compactness of congressional districts from 1962 through 1994, and finding no statistically significant impact on voter or elected officials' attitudes and behaviors, other than on turnout, although those effects were minimal in light of demographic factors); Richard N. Engstrom, *District Geography and Voters*, in *Redistricting in the New Millennium* 65, 73-74 (Peter F. Galderisi ed., 2005) (assessing the connection between compactness and voter turnout for congressional

districts from 1994 to 1998, and finding no relationship).

The NRCC also claims, as did the dissent below, that "shapes are important" not only for "visual preference but also so that legislators may identify potential gerrymanders." NRCC Br. at 20 (citation omitted). According to the dissent, deviation from traditional redistricting criteria is a necessary requirement for a partisan gerrymandering claim because "the mapmakers (and their critics) will immediately be able to detect when their efforts have produced unusual and suspicious visual results—dragons in flight, salamanders, sick chickens, or any other of the flamboyantly monikered chimeras that creative cartographers have conjured up over the decades." JS App. at 263. Of course, such glaring visuals have long helped identify potentially unconstitutional action. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (allowing a constitutional claim where "[p]rior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure," with "[t]he essential inevitable effect of . . . remov[ing] from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident"). Such colorful language, however, risks overlooking the proverbial "wolf in sheep's clothing" — the "normal"-looking district that cracks, packs, or otherwise unconstitutionally organizes people by race or party. It also overlooks that districts may be non-compact for legitimate reasons, such as protecting a

community of interest or due to natural geographical features. That is why the Court consistently has rejected attempts to categorically insulate from challenge districts that appear to conform to traditional districting principles, or to categorically condemn districts that appear "abnormal." The Court should not deviate from that path in this case.

III. Compactness Illustrates Why Appellants' Proposed Safe Harbor Is Not Warranted And Is Inconsistent With The Constitutional Values At Stake.

Considering the pitfalls inherent in a singular focus on compactness — one of the key traditional districting principles — helps illuminate the fundamental flaws in Appellants' proposed safe harbor. In short, compactness does not guarantee a constitutional district, and may in fact mask unconstitutionality. An assessment of compactness alone, or even in combination with the other traditional criteria, does not sufficiently correspond to the constitutional values at stake to serve as the ultimate standard by which to judge a partisan gerrymandering claim.

The *Vieth* plurality explained one of the inherent problems with compactness as a potential standard: it is a poor proxy for whether excessive partisan consideration has gone into the districting process. "[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines." *Vieth*, 541 U.S. at 298 (plurality opinion) (citation omitted).

That compactness, either alone or in conjunction with other traditional factors, is not an appropriate proxy for constitutionality makes sense, given the constitutional interests at stake. The Equal Protection Clause protects against intentional dilution of a group's voting power, which impairs individuals' rights to political representation. Groups can be readily diluted through "normal'-looking districts, as the well-worn concepts of packing and cracking demonstrate. Thus, the ultimate inquiry is whether there has been improper dilution, not whether a district appears "normal." Likewise, the First Amendment prohibits viewpoint discrimination, including on the basis of political beliefs. Regardless of a district's appearance, if the districting has been done to penalize particular political beliefs, there has been First Amendment harm. A mere inquiry into whether a district is compact, or otherwise in apparent compliance with traditional districting factors, will not inform whether particular political viewpoints have been penalized in violation of the Constitution.

Recent peer-reviewed social science confirms that compactness is not a reliable or sufficient proxy for whether partisan gerrymandering has occurred or whether a group has been impermissibly systematically disadvantaged. *See, e.g.*, Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, Quarterly J. of Poli. Sci. 239, 266 (2013) (explaining that compactness is not a reliable proxy for whether partisan gerrymandering has occurred

because "each state's unique voter geography may either open up or restrict opportunities for mapmakers wishing to implement politically motivated gerrymandering strategies"); *see also* Yan Y. Liu, Wendy K. Tam Cho & Shaowen Wang, *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 Swarm & Evolutionary Computation 78, 81 (2016) (recognizing that since compactness "is neither uniformly enforced by the courts nor strictly defined, it has taken on various specifications").

The non-mandatory nature of compactness as a redistricting principle further cautions against the use of compactness and other traditional districting principles as a rigid constitutional safe harbor. While the majority of states mandated compactness as a districting principle during the redistricting that occurred following the 2000 census, fourteen states did not. Nat'l Conf. of State Legislatures, Redistricting Law 2010, 106-07 (2009). The non-mandatory nature of compactness as a districting principle at the state level, where districting plans are created, debated, and implemented in the first instance indicates that compactness is not a reliable bright line for whether a district is an impermissible partisan gerrymander.

The meaning of compactness also varies from state to state, making it an improper basis for a categorical, constitutional safe harbor. For example, certain state codes specify exacting standards for compactness. *E.g.* Iowa Code § 42.4(4)(a)-(b) (2017)

(defining in detail the "[l]ength-width compactness" and "[p]erimeter compactness" to be used when comparing the "relative compactness of two or more districts, or of two or more alternative districting plans"). Others dictate that districts adhere to compactness but provide no specific guidance as to how to measure it. *E.g.* Wash. Rev. Code § 44.05.090(2)(b) (mandating in a redistricting plan that "[d]istricts should be composed of convenient, contiguous, and *compact* territory," without any specification of how compactness is to be measured (emphasis added)).

Further compounding this definitional difficulty is the fact that where no particular compactness measure is mandated by a legislature, there are numerous competing measures of compactness to choose from: "*dispersion*, the ratio of the area of the district to the area of the smallest circle that circumscribes the district;" "*perimeter*, the ratio of the area of the district to the area of the circle whose diameter equals the length of the area's perimeter;" and "*population*, the ratio of the district's population to the population contained by the minimum convex figure that encloses the district," otherwise known as the "rubber-band" area. *Vieth*, 541 U.S. at 348 n.3 (Souter, J., dissenting). The Court has yet to agree on any single way of measuring compactness, let alone one solid enough allow compactness to immunize redistricting from constitutional challenge.

Finally, ever-advancing technology, including in the areas of geographic information systems, district line drawing software, and voter information

aggregation, highlights the danger of Appellants' argument for a rigid safe harbor based on compactness and other traditional districting criteria. More than ever in history, technology can mask excessive partisanship (or racial discrimination) in a "normal"-looking district. As the district court accurately explained, "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria." JS App. at 121a-22a. Thus, "[w]hen reviewing intent," the Court "cannot simply ask whether a plan complied with traditional districting principles." *Id.*

Over a decade ago in *Vieth*, several Justices recognized the substantial impact of emerging technology on the redistricting process, without resolving the ultimate impact on the legal analysis. As Justice Kennedy cautioned, "[t]echnology is both a threat and a promise" and "the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities." *Vieth*, 541 U.S. at 312 (Kennedy. J., concurring in the judgment). For his part, Justice Souter lamented that "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine." *Id.* at 345 (Souter, J., joined by Ginsburg, J., dissenting) (citing, *inter alia*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 624 (2002) (The "pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite

gerrymandering has improved")). In no case, however, did the Court dismiss the potential of a "high-tech stealth gerrymander" as a mere "bugaboo," as the dissent below would have it. JS App. at 260a. Nor should it. The undeniable reality is that "[a] map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." *Id.* at 122a. Accordingly, compactness — like apparent adherence to *any* of the traditional districting principles — cannot categorically immunize redistricting from a partisan gerrymandering claim.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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